Retnarasa a/l Annarasa v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–62 OF 2007
MOHAMED APANDI ALI J
20 FEBRUARY 2008

Criminal Procedure — Disclosure of information — Documents — s 51A Criminal Procedure Code — Application of — Whether to be read together with s 51 of the Criminal Procedure Code — Whether s 51A only confined to trials — Whether applicable to inquisitorial proceedings — Criminal Procedure Code ss 51 & 51A

Criminal Procedure — Disclosure of information — Inquests — Whether magistrate conducting inquest conferred discretionary power to release documents — Whether such discretionary power ought to lean in favour of releasing documents — Whether refusals to order release ought to be justified with reasons — Practice Direction 1 of 2007, guidelines — Criminal Procedure Code ss 51 & 51A

The magistrates' court was conducting an inquest into the death of the applicant's wife when counsel made an oral application for several reports to be supplied to the applicant. The magistrate refused and instead ordered that the reports be given to the applicant after the relevant medical witnesses had given evidence. The applicant filed a notice of motion to set aside the magistrate's order; and to be supplied with the relevant reports. Counsel subsequently narrowed his application for disclosure to the post-mortem report on the applicant's deceased wife.

Held, varying the order of the magistrate and ordering the supply of the post-mortem report to the applicant forthwith:

(1) Magistrates conducting an inquest are obliged to follow Practice Direction No 1 of 2007. The practice direction is a very comprehensive guideline for magistrates to follow in an inquest. It confers upon a magistrate a discretionary power with regard to the release of documents. This discretion ought to be exercised in favour of releasing documents. Refusals to release documents have therefore to be justified with reasons (see paras 6–7).

(2) Section 51A of the CPC is a new provision that was primarily legislated to give effect to the changing trend in the administration of criminal justice for pretrial discovery. Section 51A cannot be read in isolation but has to be read together with s 51 of the CPC. Therefore, even though s 51A of the CPC speaks of 'the trial', the provision should not be limited to trials only. If pretrial discovery is allowed in a trial which is an adversarial proceeding, there is no reason not to allow such discovery in an inquest which is an inquisitorial proceeding. In an inquisitorial proceeding, there is no question of prejudice or embarrassment. Not to allow discovery in such proceeding would be prejudicial to the right to know the truth (see paras 8–10).

(3) With the coming into force of the new s 51A of the CPC, case law relating to disclosure of information and documents decided before the implementation of s 51A would no longer be relevant (see para 11).

(4) Magistrates do also have power to order discovery of facts or documents by any party or person, as provided for under s 99A of the Subordinate Courts Act 1948, as amplified in para 7 of the Third Schedule of the said Act (see para 12).

[Bahasa Malaysia summary

Mahkamah majistret sedang menjalankan inkues punca kematian isteri pemohon apabila peguam membuat permohonan lisan untuk beberapa laporan diberikan kepada pemohon. Majistret enggan dan sebaliknya memerintahkan agar laporan-laporan tersebut diberikan kepada pemohon selepas saksi-saksi perubatan yang relevan telah memberikan keterangan. Pemohon telah memfailkan notis usul untuk mengenepikan perintah majistret; dan untuk dibekalkan dengan laporan-laporan relevan tersebut. Peguam kemudian telah memperincikan permohonannya untuk pendedahan laporan postmortem ke atas isteri pemohon yang telah meninggal dunia.

Diputuskan, mengubah perintah majistret dan memerintahkan laporan postmortem diberikan kepada pemohon:

(1) Majistret-majistret yang mengendalikan inkues perlu mematuhi Arahan Amalan No 1 Tahun 2007. Arahan amalan merupakan panduan komprehensif untuk diikuti oleh majistret-majistret dalam suatu inkues. Ia memberikan majistret kuasa budi bicara berkaitan pengeluaran dokumen-dokumen. Budi bicara ini patut digunakan untuk mengeluarkan dokumen-dokumen. Keengganan untuk mengeluarkan dokumen-dokumen oleh itu hendaklah dijustifikasikan dengan alasan-alasan (lihat perenggan 6–7).

(2) Seksyen 51A KPJ adalah peruntukan baru yang digubal terutamanya untuk memberi kesan kepada arah aliran yang berubah dalam pelaksanaan keadilan jenayah untuk penemuan pra perbicaraan. Seksyen 51A tidak boelh dibaca secara berasingan tetapi perlu dibaca bersama s 51 KPJ. Oleh itum meskipun s 51A KPJ menyebut tentang 'the trial', peruntukan itu tidak patut terhad kepada perbicaraan sahaja. Jika penemuan pra perbicaraan dibenarkan dalam suatu perbicaraan yang merupakan prosiding adversarial, tiada alasan untuk tidak membenarkan penemuan sedemikian dalam inkues yang merupakan prosiding penyiasatan. Dalam prosiding penyiasatan, tiada persoalan tentang prejudis atau sesuatu yang memalukan. Dengan tidak membenarkan penemuan dalam prosiding sebegini akan memprejudiskan hak untuk mengetahui kebenaran (lihat perenggan 8–10).

(3) Dengan penguatkuasaan s 51A KPJ yang baru itu, kes undang-undang berkaitan pengeluaran maklumat dan dokumen yang diputuskan sebelum pelaksanaan s 51A tidak lagi relevan (lihat perenggan 11).

(4) Majistret-majistret juga mempunyai kuasa untuk memerintahkan penemuan fakta atau dokumen oleh mana-mana pihak atau individu seperti yang diperuntukkan di bawah s 99A Akta Mahkamah Bawahan 1948, seperti yang dihuraikan dala perenggan 7 kepada Jadual Ketiga Akta tersebut (lihat perenggan 12).]

Notes

For cases on documents for disclosure of information, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1752–1757.

For cases on inquests for disclosure of information generally, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1750–1776.

Cases referred to

Mohamed bin Musa v DPP [1972] 1 MLJ 49 (overd)

PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP [1985] 2 MLJ 436 (overd)

Legislation referred to

Courts of Judicature Act 1964 s 35
Criminal Procedure Code ss 51, 51A
Subordinate Courts Act 1948 ss 4, 59(4), 76(3), 99A, Third Schedule, para 7

V Sithambaram (C Ghanendran with him) (Sitham & Associates) for the applicant.

Shamsul Sulaiman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamed Apandi Ali J:

[1] This is a notice of motion by the applicant arising from an inquest proceeding at the magistrate's court. The applicant is the husband of the deceased. In the course of the inquest proceeding counsel for the applicant made an oral application to the magistrate who was holding the inquest; for the reports (ie post-mortem reports and other medical reports) to be supplied. Magistrate refused and in the order only allowed access to the reports be given *after* the relevant medical witnesses has given evidence. In the motion (notice usul) — KM2, the applicant is asking for:

(i) the order not to have access to the post-mortem report and other medical reports until after medical witnesses have given evidence, be set aside; and

(ii) that applicant to be supplied with a copy of the post-mortem report and all other medical reports of the deceased.

[2] All parties have filed written submissions on this matter. Counsel for applicant, in his submission in reply has now watered down the application, and limiting it to the supply of the *post-mortem report only*.

[3] Basically this motion is an application for disclosure of documents. The position in law on this issue and subject-matter is governed by two provisions of the law, namely:

(1) Practice Direction No 1 of 2007, with the heading 'GUIDELINES ON INQUEST'; and

(2) Section 51A of the Criminal Procedure Code.

(1) PRACTICE DIRECTION NO 1 OF 2007

[4] This practice direction is dated 5 January 2007 and is so worded that it '*shall be followed* ...' with effect from 1 February 2007. It was issued by the then Chief Judge of Malaya, Tan Sri Dato' Siti Norma Yaakob. It is therefore *imperative* for magistrates to abide by the direction.

[5] To remove any doubt, I must note Practice Directions issued by the Chief Judge of Malaya do have the force of law. This is so because the Chief Judge (meaning Chief Judge of Malaya for Peninsular Malaysia and Chief Judge for Sabah & Sarawak) do have supervisory powers over the subordinate courts. This can be seen in ss 4, 59(4) and 76(3) of the Subordinate Courts Act 1948 and of which such powers has to be read with s 35 of the Courts of Judicature Act 1964.

[6] Now let us have a closer look at Practice Direction No 1 of 2007. It comprises a *very comprehensive* guideline for magistrates to follow in an inquest. The relevant provision is para D under the heading *Disclosure of Documents*, at p 7 of the practice direction. It reads: 'The Magistrate have the *discretion* with regard to the *release* of documents. This discretion should in general be exercised in favour of release'.

[7] Here from the wordings, the general rule: is to release (which as per the heading will mean 'disclosure') the document; and not releasing the document will be an exception. That being so, any refusal to release (or disclose) must be justified with reasons for such a refusal.

SECTION 51A OF THE CRIMINAL PROCEDURE CODE

[8] This is a new provision that came into being by virtue of *Amendment Act A 1274/06*. This new provision is primarily legislated to give effect to the changing trend in the administration criminal justice for pretrial discovery. On this issue parties in today's application took different stands and views.

[9] In my opinion, s 51A of the Criminal Procedure Code cannot be read in isolation but it has got to be read together with the proceeding section, namely s 51 of the Criminal Procedure Code. If one were to read s 51 of the Criminal Procedure Code, it is clear in the wordings '... production of property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this Code ...' It therefore encompasses an 'enquiry' or inquest. Even though s 51A of the Criminal Procedure Code speaks of 'the trial' it should not be limited to trials only.

[10] After all, an inquest is *inquisitorial* in nature as compared to a trial, which is *adversarial* in nature. If in an adversarial proceeding pretrial discovery is allowed, there is no reason not to allow such discovery in an inquisitorial proceeding. In an inquisitorial proceeding, such as an inquest, there is no question of prejudice or embarrassment. Not to allow will be prejudicial to the right to know the truth. After all we are living in an era of transparency.

[11] With the coming into force the provisions in the new s 51A of the Criminal Procedure Code, cases relating to disclosure of information and documents, which were decided before this, ie before the implementation of the said pretrial discovery provisions, such as *Mohamed bin Musa v Deputy Public Prosecutor* [1972] 1 MLJ 49 and *PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 will no longer be relevant.

[12] And furthermore magistrates do have the power to order discovery of facts or document by any party or person. This is provided for under the provision of further powers as can be seen in s 99A of the Subordinate Courts Act 1948 which is amplified in para 7 of the Third Schedule of the said Act.

[13] In conclusion, allowing disclosure of the postmortem report of the deceased to counsel representing the husband of the deceased either *before* or *during* the inquest is well within and in accordance to the provisions of the law.

[14] As such, this court gave order In terms in respect of the prayers in the motion (KM2) but with a varying order that it shall be limited to the postmortem of the deceased only. Consequentially it is ordered that the respondent do supply the said post-mortem report to the applicant forthwith.

Order of magistrate varied and the applicant to supply the post-mortem report.

Reported by Andrew Christopher Simon